No. 14373

United States Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant,

v.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

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Appeal from the United States District Court for the Western District of Washington, Southern Division

BRIEF OF APPELLANT

STATEMENT AS TO JURISDICTION

The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a common carrier by railroad, brought this suit originally in the United States District Court, Western District of Washington, Southern Division, against the Northern Pacific Railway Company, also a common carrier by railroad, to enjoin it from constructing a section of track. The plaintiff alleged it has a branch line of railroad serving the town of Moses Lake, and that the territory sought to be reached by the defendant's proposed track would invade the plaintiff's territory.

Plaintiff brings this action under Part I of the Interstate Commerce Act (Title 41, U.S.C.A., paragraphs 1 to 27, inclusive). [49 U.S.C.A.]

After hearing, the District Court made Findings of Fact and Conclusions of Law and entered final judgment enjoining the defendant, Northern Pacific, from constructing the proposed track. Appellant has appealed from this final judgment.

STATEMENT OF THE CASE

The Washington Central Branch of the appellant, Northern Pacific Railway Company, extends from Connell, Washington, a point on its main line between Pasco and Spokane, Washington, in a generally northerly direction to Adrian, and thence to Cheney, Washington, a point on such main line, a distance of approximately 190 miles. That portion of the main line between Connell and Adrian, approximately 61 miles in length, is generally referred to as the Connell Northern Branch. It is located largely in Grant County, Washington, and at its nearest point is approximately 5 miles easterly of the city of Moses Lake (Exhibit 11; R. 228). The construction of the Connell Northern Branch was started in June, 1909, and completed November 1, 1910. The first freight was handled on the line, however, in September, 1910 (R. 228). The appellee's branch line, extending into Moses Lake, was not constructed until some two years later (R. 143).

The Connell Northern was constructed for the purpose of providing rail transportation service for the products of the agricultural lands traversed by the line between Connell and Adrian. At the time of the construction of the branch and until recent irrigation development under the Columbia Basin Project, the agri-

cultural lands were devoted largely to dry land wheat production with the rougher lands utilized for seasonal livestock grazing (R. 230).

Following the construction of the Grand Coulee Dam, the face of the land began to change. The Columbia Basin Project came into being, so that ultimately 1,029,000 acres of land will be under irrigation (R. 231). The lands in the Wheeler-Moses Lake area will be included in this project and are designated as East Columbia Irrigation District (R. 232). The Connell Northern Branch runs about through the center of the district.

There is a vicinity west of Wheeler which lies as a plateau above the town of Moses Lake, which runs southeast to Raugust, a distance of about 4 miles from Wheeler, and northward toward Gloyd, a distance of 4 to 6 miles from Wheeler (R. 232). (For location of such stations, see Exhibit 11.)

At the time of the formation of the East Columbia Irrigation District, the appellant owned about 2,750 acres of land in the District. In accordance with a contract with the Bureau of Reclamation, all of the lands were divided into farm units (R. 287) and approximately 2,150 acres were sold to individual settlers (R. 289). Also, in accordance with the agreement, the remaining 600 acres, or seven farm units, were retained by the appellant for industrial purposes (R. 290). If the land is not used for industrial purposes, in ten years from 1953 it will revert to farm units (R. 293). Four of these reserve farm units lie in Section 13, Township 19 North, Range 28 East W. M. (R. 290). The land which the appellant seeks to serve with its proposed track lies

in this Section 13, which will hereinafter be referred to as "Section 13."

The appellant seeks to build a track, for which it acquired the necessary right of way, from its Connell Northern Branch into Section 13, for the purpose of serving two industries which desire to locate there (R. 339). The track would have a total length of 3.9 miles, that is, it would spring from the branch line on a wye, then proceed westerly to the north side of Section 13, then turn south and run through the center of the section to the south section line (R. 301; Exhibit A3). The total cost of the track, including fence, culverts, siphons and right of way, would be $205,505 (Exhibit A23; R. 303). The track would be on a maximum grade of 1.5 undulated, which means it would be up and down on the contour of the ground. For the greater part of the distance the track will just lie "on top of the grass" (R. 301).

At the westerly edge of the plateau west of Wheeler, above referred to, the land breaks sharply down into a valley where lies Moses Lake. This break begins at about the center of Section 13 (Exhibit A3, a topography map). It will be noticed from observing this map that the first topography contour runs through the center of Section 13 and is marked 1190. It will also be noticed that there is at first a gradual slope to the west, then the hill steepens until it descends to a flat, where the buildings of the town of Moses Lake are. The contour at the water level is 1044 (R. 354), which makes a difference in elevation of 146 feet. Pictures of the area, introduced as exhibits in this case, clearly show the situation

just described (Exhibit A6 through Exhibit A21).[1] The picture, Exhibit A18, was taken from a point located 600 feet east of the northwest corner of Section 13 toward Moses Lake. The camera was pointing northeast to south and the picture shows the bluff, some half a mile or more beyond the city limits of Moses Lake, on top of which the proposed spur is to be built. Exhibit A20, taken from a point 493 feet west of the quarter corner on the north line of Section 13, with camera facing south to west, shows the site of Moses Lake.

At a point 1.1 miles west of Wheeler and a little to the south, the Utah-Idaho Sugar Company constructed a large sugar refinery in 1953 (R. 242). In order to put rail facilities into this industry, the appellant built a spur from its main line 1.1 miles in a westerly and southerly direction from Wheeler. Also, in order to serve this industry, the appellee built a spur from its main line in a northerly direction, a distance of 3.4 miles (R. 348). The Utah-Idaho Sugar Company plant lies in the area between the appellant's station of Wheeler and the appellee's station of Moses Lake (Exhibit A3).

The Pacific Fruit and Produce Company desires to build a warehouse on Section 13 (R. 260), for the pur-

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[1] For the locations from which the pictures were taken see circles placed on Exhibit 3. For an explanation of the numbering see R. 216 and R. 218. Exhibits A6, A7, A8 and A9 all show the general character of the plateau country. A7 shows the town of Wheeler (R. 216-217). A10 was taken from the point of intersection of the branch line and the proposed track (R. 218) and shows the type of land over which the proposed track would be laid.

pose of processing potatoes and onions and shipping them to various points throughout the country (R. 260, 282). Eventually, the operation might expand to distribution of fruits and vegetables (R. 260). In addition to the above a jobbing and local distribution operation would serve an area of probably a 75-mile radius (R. 263) and would not be limited to the retail outlets of Moses Lake (R. 264). Section 13 suits the purpose of the Pacific Fruit and Produce Company, and it intends to build a warehouse as soon as the Northern Pacific can assure it a track will be built (R. 261). Pacific Fruit and Produce Company likes Section 13 because there is room to operate and to expand. They want to be outside a city (R. 261, R. 262). Most of the potatoes are grown east of Moses Lake, and Section 13 would give them a central location (R. 265). In addition to the foregoing, Pacific Fruit and Produce have additional reasons for being on Northern Pacific trackage. Most of its facilities in the Northwest are served by Northern Pacific tracks (R. 278). Shipments could be partially unloaded at one facility and the balance carried to the next one if the shipment was on Northern Pacific rails, but this would not be true on Milwaukee rails (R. 280). One-line service is superior to two or more, because no interchange is necessary and there is no need of extra switch service (R. 280). Also, the Pacific Fruit and Produce Company distributes potatoes, onions and other vegetables to the Vancouver-British Columbia area. There is no through rate from Moses Lake on the Milwaukee Railroad to Vancouver, but there is from Wheeler on the Northern Pacific, so that the Northern Pacific rate is lower (R. 281).

Mr. L. T. Warsinske, President of the Interstate Metals Company, distributor of steel buildings for farm and industrial purposes, testified that he inquired of the appellee for possible sites for location of his warehouse upon Milwaukee tracks, but they had nothing that suited him (R. 334). Section 13 is suitable for his needs (R. 335). He is prepared to and is desirous of building a warehouse for his operations, but he will need spur track service (R. 336).

The appellant's proposed track from its branch line into Section 13 will be constructed of second-hand rails, second-hand ties and fastenings (R. 295). The ties and rails recovered from other tracks that are being relaid and improved will be used for the construction of this track. It will in all respects be typical spur track construction (R. 296).

There will be no passenger service, no express or mail service, no telephone or telegraph service on this proposed track (R. 296-297). The billing and other agency service required in connection with shipments over the trackage will be handled by the agent at Wheeler (R. 296). There is a daily local freight train which runs over the Connell Northern Branch. All the switching on this proposed track would be handled by this train crew. The traffic would be principally carload (R. 297-298).

With respect to the Milwaukee's constructing trackage up the hill to serve Section 13 from its existing trackage in Moses Lake, Mr. Derrig, Assistant Chief Engineer of appellant, testified as to certain possible alternative projections.

The first one, as shown on Exhibit A24, is a 1.1%

grade (R. 306), and would be 3.7 miles long (R. 308). Its estimated cost would be $184,558 (R. 312). The second one, as shown on Exhibit A24, would be a 1.5% grade and be 3.1 miles long (R. 308). The estimated cost would be $166,155 (R. 314). The third one, as shown on Exhibit 25, would be a 2% grade, the estimated cost of which would be $181,536 (R. 315).

Mr. Derrig considers the 1.1% grade the best line from an engineering standpoint, because it fits the contour of the country. There would be less grading and hence less maintenance, and you are least likely to run into rock (R. 310-311).

Mr. Crippen of the Milwaukee testified he could build a spur track to Section 13 from the Milwaukee connection at Moses Lake, on a 2% grade, for $70,000 exclusive of right of way. He estimates the cost of the right of way would be $22,500 (R. 371). Also that he could build a track on a 4% grade into Section 13 for $49,000 with an estimated cost of right of way of $12,000 (R. 371).

On May 24, 1948, the appellant applied to the Interstate Commerce Commission for a certificate to extend its line of railroad from a point on its Connell Northern Branch into the town of Moses Lake (R. 382). The extension would descend the hill in a southwesterly direction, enter the town of Moses Lake, and connect with the Government-owned railroad which serves the Larson Air Base (Exhibit A3). The Commission held that public convenience and necessity had not been proved, and denied the application without prejudice to renewing it at a future date (R. 381).

SPECIFICATIONS OF ERROR

I.

The trial court erred

(a) in refusing to find that the proposed track to be constructed by the appellant westerly from its Connell Northern Branch to Section 13, Township 19 North, Range 28 East W.M., Grant County, Washington, is a spur or industrial track within the meaning of Title 49, Section 1(22), U.S.C.A.;

(b) in finding (Finding of Fact VII):

> "That the evidence overwhelmingly establishes that as a matter of fact the said proposed track of the defendant is an extension and not a spur or industrial track within the meaning of the aforedescribed provisions of the Interstate Commerce Act, and that a certificate from the Interstate Commerce Commission certifying the public convenience and necessity is required for the building of such track." (R. 16);
> and

(c) in concluding (Conclusion of Law II):

> "That the proposed track of the defendant described in paragraph IV of the foregoing findings is an extension of the defendant's line of railroad within the meaning of Section 1(18) of the Interstate Commerce Act (49 U.S.C. 1(18)), and cannot lawfully be constructed until the defendant shall first have obtained from the Interstate Commerce Commission a certificate that the present or future convenience and necessity require, or will require, the construction or operation, or construction and operation, of such additional or extended line of railroad." (R. 16, 17)

The record clearly establishes that appellant's pro-

posed track will not extend into new territory not tributary to its line or invade territory already adequately served by appellee.

II.

The court erred

(a) in refusing to find that the land sought to be reached by the said proposed track is tributary to the appellant's Connell Northern branch line of railroad and the territory served thereby, since the said land sought to be reached is not now served by any other railroad and the industries to be served by the proposed track are situated similarly to the U. & I. Sugar Company, are in the same territory, and are entitled to like service from the carrier; and

(b) in finding (Finding of Fact V):

"That the territory sought to be reached by the said proposed track or line of railroad is adjacent and tributary to the trading center of the City of Moses Lake, which City is already being served by the plaintiff's aforesaid railroad and that it is feasible and practicable for said area to be served and occupied by the plaintiff railroad. . . . " (R. 15)

The record clearly establishes that appellant's proposed track will not extend into new territory not tributary to its line or invade territory already adequately served by appellee.

III.

The court erred

(a) in refusing to find that it is more feasible and practicable to serve the land by a track connection with the appellant's railroad, or that in any event both railroads should be allowed to serve the territory; and

(b) in finding (Finding of Fact V):

> " . . . that it is feasible and practicable for said area (Section 13) to be served and occupied by the plaintiff railroad (appellee). . . . " (R. 15)

The record clearly establishes that appellant's proposed track will not extend into new territory not tributary to its line or invade territory already adequately served by appellee.

IV.

The court erred in finding (Finding of Fact V) that the construction of the proposed track would involve a substantial sum of money and would deprive the appellee of substantial revenue.

The court found in Finding of Fact V:

> " . . . That the construction by the defendant of said track or line of railroad would entail the expenditure of a substantial sum of money, and would deprive the plaintiff of substantial revenues." (R. 15)

The record clearly establishes that the cost of the proposed trackage is not substantial when considered in connection with contemplated revenues therefrom, and that the appellee would not be deprived of any revenues, since the proposed trackage would serve new industries in the area.

V.

The court erred in finding (Finding of Fact VI) that the construction of the proposed track by the appellant is in the same territory or substantially the same as that territory sought to be served by the appellant by virtue of its application to the Interstate Commerce Commis-

sion on or about May 24, 1948, for an extension of its line of railroad into the town of Moses Lake.

The court found in Finding of Fact VI:

> "That defendant heretofore, on or about May 24, 1948, applied to the Interstate Commerce Commission under the provisions of Section 1(18) of the Interstate Commerce Act for a certificate of public convenience and necessity for the construction of an extension of its line in substantially the same territory as the track or line of railroad described in paragraph IV hereof. That the Interstate Commerce Commission on May 20, 1949, in its Finance Docket No. 16119, issued its decision and order holding that present and future public convenience and necessity were not shown to require the construction and operation of said extension, and denying said application. That there is no substantial or material difference in the defendant's said 1948 proposal and that presented by the present proposal. That the defendant has neither applied for nor received a certificate of public convenience and necessity from said Interstate Commerce Commission for the construction or operation of the track or line of railroad described in said paragraph IV hereof." (R. 15, 16)

The record clearly establishes that appellant's proposed trackage does not extend into the town of Moses Lake or substantially into it.

ARGUMENT

Specifications of Error I, II and III

I. The court erred in refusing to find that the proposed track to be constructed by the appellant westerly from its Connell Northern Branch to Section 13, Township 19 North, Range 28 East W.M., Grant County, Washington, is a spur or industrial track within the meaning of Title 49, Section 1(22), U.S.C.A., and in finding and concluding to the contrary (Finding of Fact VII and Conclusion of Law II).

II. The court erred in refusing to find that the land sought to be reached by the said proposed track is tributary to the appellant's Connell Northern branch line of railroad and the territory served thereby, since the said land sought to be reached is not now served by any other railroad and the industries to be served by the proposed track are situated similarly to the U. & I. Sugar Company, are in the same territory, and are entitled to like service from the carrier, and in finding to the contrary (Finding of Fact V).

III. The court erred in refusing to find that it is more feasible and practicable to serve the land by a track connection with the appellant's railroad, or that in any event both railroads should be allowed to serve the territory, and in finding to the contrary (Finding of Fact V).

Specifications of error I, II, and III are so interrelated that they will be discussed together.

The fundamental issue in this case is whether the track which appellant, Northern Pacific, proposes to construct, extending from its branch line to Section 13, is an "extension" of its line of railroad within the

meaning of Section 1(18) of the Interstate Commerce Act (49 U.S.C.A. §1(18)), for which a certificate of public convenience and necessity from the Interstate Commerce Commission is required, or whether such track is a "spur" within the meaning of Section 1(22) of the Act (49 U.S.C.A. §1(22)), for which no such certificate is required.

Section 1(18) of the Act, in so far as here material, provides as follows:

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Section 1(22) of the Act is as follows:

> "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of

street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

There are no provisions of the Act which define extensions of rail lines as distinguished from spur, industrial, or switching tracks. The adjudicated cases have announced certain rules which are helpful but they have established no exact rule-of-thumb formula by which this distinction can be readily determined in each case. Although in the final analysis the decision in each case must depend upon the particular facts there involved, certain principles have evolved from the decisions which rather definitely permit the determination of the question in any given case.

It is clear that in the ordinary sense the track involved in this case is a spur track. It is a track projected from appellant's branch line for the purpose of reaching and serving two industries which desire to locate on appellant's land in Section 13. It is comparable in all respects to the spur track built by the appellant from the same branch to reach the sugar refinery in the same general area and the spur track constructed by the Milwaukee from its branch, a distance of some 3½ miles, to reach the Sugar Company's plant. The track to Section 13 is located wholly within the State of Washington. Appellant's branch line has served the territory in which Section 13 is located since 1912—two years before the Milwaukee's branch reached the area. The lands to be reached in Section 13 by the track are clearly tributary and adjacent to appellant's branch.

We have found no case, and we are certain there is none, where the court has found a similar track pro-

jection, under conditions comparable to those in this case, to be an extension of a line of railroad. To the contrary, under comparable facts the courts have found such tracks to be spurs within the meaning of Section 1(22) of the Act.

From the decisions it is essential that to constitute the track here in question an extension of appellant's line of railroad, it must clearly appear that such track extends into *new* territory which is *not tributary* to appellant's line *or* that it *invades* territory already *adequately served* by the appellee. That, in substance, is the holding in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.,* 270 U.S. 266, 70 L.ed. 578. That case (which we will sometimes hereinafter refer to as the "Texas & Pacific case") was decided in 1925 and was the first United States Supreme Court decision construing Sections 1(18) and (22) of the Act, which were adopted as a part of the Transportation Act of 1920. It has frequently been referred to as the leading case on the subject. The court held the track there in question to be an extension. Appellee here places sole reliance upon that case and attempts by the allegations of its complaint to bring itself within the principles of that case, as it did in the case of *Chicago, M., St. P. & P. R. Co. v. Chicago & E. I. R. Co.* (C.C.A. 7), 198 F.(2d) 8, which we will hereinafter discuss.

In the *Texas & Pacific* case, *supra* (270 U.S. 266), the Texas & Pacific Ry. Co. sought to enjoin the Santa Fe from constructing a track into an industrial area in the city of Dallas, Texas. The Santa Fe defended on the ground that the line was an industrial or spur track. The Supreme Court held the track to be an extension.

The facts involved are fully set forth in the Supreme Court's decision, which we quote as follows:

"The facts on which the Santa Fe contends that the proposed line is merely an industrial track are undisputed. Dallas is a large interior city. The Texas & Pacific extends through it and beyond in a general westerly direction; the Santa Fe in a general southwesterly direction. Both lines have been operated for many years. Along the Texas & Pacific, commencing at a point 2½ miles west of the city and extending westward about 2½ miles further, lies territory known as the 'industrial district.' *To its development the facilities and services of these industries.* Their traffic from or destined to the Santa Fe or other lines is interchanged by the Texas & Pacific at points on its line distant from these industries from 12 to 30 miles. Thus, the Texas & Pacific receives either the whole or a part of the revenue on all the traffic of the district—the richest freight-producing territory in all Texas.

"*The Santa Fe has no branch line running near to, or in the direction of, any part of the industrial district.* Hale is a station on its road. The proposed line is to begin at Hale, where storage and assembling yards are to be located, and is to end in the industrial district, near the Texas & Pacific right of way. The air-line distance from Hale to the proposed terminus is only 3¼ miles; but the length of line is 7½ miles, besides spurs, sidings and other subsidiary tracks. The greater length is necessitated in part by topographical conditions. These are such that the cost of construction is estimated at $510,000. There is to be one under crossing, where the new line intersects an interurban line, another where it intersects a highway. There are to be two small trestles and numerous fills and cuts. In some

respects the character of the construction is that commonly used for industrial tracks. No intention appeared to ballast the track save in stretches where the material was bad. . . .

"*The Hale Cement Line was projected by the Santa Fe in order to reach on its own rails the six plants within the district which lie south of the Texas & Pacific Railroad.* These furnish 80 per cent of the traffic of the District. If enabled thus to tap it direct, the Santa Fe can secure a part of the strictly competitive business, and can eliminate the division of rates with the Texas & Pacific on all freight of the District received from or destined to the Santa Fe lines, which is now necessarily handled as interline traffic. The freight revenues which the Santa Fe would thus obtain and divert from the Texas & Pacific are estimated at more than $500,000 a year." (Emphasis supplied)

In holding the proposed Santa Fe trackage to be an extension rather than a spur, the court said:

" . . . A truer guide to the meaning of the terms extension and industrial track, as used in Paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern, that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the

public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission v. Chicago, B. & Q. R. Co.,* 257 U.S. 563, 66 L. ed. 371, 22 A.L.R. 1086, 42 Sup. Ct. Rep. 232; *New England Divisions Case* (*Akron, C. & Y. R. Co. v. United States*) 261 U.S. 184, 67 L. ed. 605, 43 Sup. Ct. Rep. 270; *Chicago Junction Case* (*Baltimore & O. R. Co. v. United States*) 264 U.S. 258, 68 L. ed. 667, 44 Sup. Ct. Rep. 317; *Railroad Commission v. Southern P. Co.,* 264 U.S. 331, 68 L. ed. 713, 44 Sup. Ct. Rep. 376. The act sought, among other things, to avert such losses.

"When the clauses in Paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks . . . to be located wholly within one state.' *Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier.* The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. *But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Con-*

gress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of Paragraph 18, although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it can not be built unless the Federal commission issues its certificate that public necessity and convenience require its construction. The Hale-Cement Line is clearly an extension within this rule." (Emphasis supplied)

The facts in the foregoing case clearly distinguish it from the case at hand. Some of the more distinguishing features are:

1. The very area which the Santa Fe sought to serve had been developed through the facilities and service of the Texas and Pacific, which was rendering adequate service by direct connection with each of the existing industries. In our case, the appellee has had no part in developing the industries which the appellee intends to serve. The two industries which have expressed a desire to locate on Section 13, *viz.*, Pacific Fruit & Produce Company and Interstate Metals Company, for sound economic and operating reasons desire the appellant's service rather than the appellee's. In addition, at the present time the appellee does not have existing tracks suitable for serving either of said industries which are

in immediate prospect of developing on appellant's proposed track.

2. The only purpose for the Santa Fe's building the proposed track was to divert from the Texas & Pacific business which it had developed on its own rails, and it was estimated that this diversion of freight revenues from the Texas & Pacific to the Santa Fe would be more than $500,000 a year. In our case, the appellant does not propose to serve any plants which are now served by the appellee. Thus, for all practical purposes the appellee would not lose any business which it now enjoys by virture of the appellant's building its proposed track.

3. In the above case the territory sought to be served had never been adjacent to any line of the Santa Fe. In our case the territory has been adjacent to the appellant's branch line since 1910, which was two years before the appellee built its branch into the town of Moses Lake (R. 228, 143).

4. In the above case there was no showing that any industry was brought into the area with the expectation or desire of receiving Santa Fe's service. There was no proof that such service would be preferable to Texas & Pacific service. In our case the appellant is asking to serve property which the appellee has never served, on which the appellee has no tracks, and which the appellee cannot serve without building additional tracks, just as the appellant is doing. *The appellant is not seeking to effect a duplication of service as was true in the Texas & Pacific case.*

5. In the *Texas & Pacific* case the Santa Fe was not attempting to develop any new business, but was trying

to participate in business developed by the Texas & Pacific. In our case the area is undeveloped except for the U. & I. Sugar Company plant. As it develops, additional trackage will have to be built. There is no sound economic or legal reason why the appellee should have the exclusive right to develop and serve this large potential industrial area.

6. In the *Texas & Pacific* case the court held that, by enacting Section 1(18) of the Act, Congress intended to eliminate the building of unnecessary lines involving a waste of resources so that the burden of such waste would not fall upon the public. In other words, the court concluded that Congress sought to eliminate the very form of wasteful and needless competition which the Santa Fe attempted to engage in by invading or raiding the established business of another carrier which was serving that business adequately. In the present case appellant will not duplicate the existing service rendered by the appellee. Moreover, at all times, even before the Milwaukee's branch line was built, the appellant has been in a position to serve any industry adjacent to its branch line, desiring its service.

7. In the *Texas & Pacific* case, in speaking of what constituted a track an extension, as distinguished from a spur, the Supreme Court said (p. 278):

> ". . . But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern . . . . If the purpose and effect of the

> new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18 . . . . "

The appellant's proposed track is not an extension within the meaning of the above definition. It does not extend either into new territory or territory already served by the appellee. Appellant is merely developing, as the demand for its service arises, territory which it has potentially served from the time its branch line was first placed in operation. True, it is extending a track where it did not have a track before, but that is not what is meant by extending into new territory. Every new spur or industrial track is laid where no track existed before, but such tracks do not extend into new territory and thereby become an "extension" within the meaning of Section 1(18) of the Act.

There is another important consideration of public interest in this case. Congress not only desired to prevent wasteful competition between railroads, but it wished to provide for an adequate transportation service to the public. It is undisputed here that two shippers who are to build plants on appellant's proposed track want appellant's service because it offers them certain advantages which the appellee cannot provide.

Furthermore, Congress did not intend to eliminate all competition between carriers. It sought merely to prohibit wasteful and needless competition. When two lines of railroad are situated equally favorably to serve an industrial area, each is entitled to compete for the business therein. This is desirable competition.

The case of *Texas & Pacific Ry. Co. v. Gulf, etc.,* 270 U.S. 266, 70 L. ed. 578, 584, further states:

> " . . . The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks . . . to be located wholly within one state.' *Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier.* The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. . . . " (Emphasis supplied.)

As has been previously stated to the court, the area west of Wheeler, for a matter of about 3½ miles, is a plateau extending to the north and to the south. Then the land breaks sharply to the west down to the town of Moses Lake.

The U. & I. Sugar Company built a plant on this plateau. In order to serve the sugar plant, the appellant built a spur track 1.1 miles in length to the Sugar Company's property. Also, in order to serve the plant, the appellee built a spur track 3.4 miles in length (Exhibit A3).

The proposed track is on the section line one mile north of the Northern Pacific Sugar Spur. The center of the south boundary of Section 13, the terminal of the proposed track, is about 2-2/7 miles from the point where the Northern Pacific Sugar Spur turns into the U. & I. Sugar property (Exhibit A3). The question now

arises as to whether the proposed plant facilities of the Pacific Fruit & Produce Company and the Interstate Metals Company are within the meaning of the above stated rule laid down in the *Texas & Pacific* case. Are they within the same territory and similarly situated with the sugar plant? It would have been a simple matter to have extended the Sugar Spur into Section 13 to serve the Pacific Fruit & Produce and the Interstate Metals. The ground between them is perfectly flat, and they would be only a little over two miles beyond the sugar turnout. A spur may render service to more than one industry without changing its character. *Great Northern Abandonment,* 247 I.C.C. 407.

If for operating or other reasons the railroad prefers to spring a new track rather than extend the sugar spur, is the character of the new track changed? It is respectfully submitted that it is not. It is still only serving industries "who are in the same territory and similarly situated."

It would be possible to extend a track from the Milwaukee branch line at Moses Lake up the hill to Section 13. The engineering witnesses for the appellant and appellee dispute as to method and cost. The appellant's witness testified that the best grade would be a 1.1% with a switchback which would be 3.7 miles long (R. 308), and would cost about $184,558 (Exhibit A24, R. 312). The reason it would be the best is that there would be less grading, hence less maintenance, and you would be least likely to run into rock (R. 310-311). The appellee's witness testified he could build a spur from the Milwaukee connection at Moses Lake to Section 13 on a

2% grade for about $92,000, and he could build one on a 4% grade for about $61,000 (R. 371).

Would the track from the Milwaukee branch at Moses Lake to Section 13 be a spur or an extension? If length determined the answer, the Milwaukee engineers could put the track on an unfavorable grade which would mean more maintenance in the future because of erosion, washing from irrigation water, etc., which would mean more cost, but they could shorten it and cut the original cost to the point where the court could say it is a spur. If the track is put on the most favorable grade, it is 3.7 miles long. It would cost an estimated $181,536 and be 2/10 of a mile shorter than the one the appellant intends to build in the instant case. This surely can't be the right answer in the situation here presented.

There are other cases holding a proposed track to be an extension, but in all of them, as in the *Texas & Pacific* case, the facts are clearly distinguishable from those in the instant case.[2] However, in all cases where the facts are similar to those in this case, the courts without exception have held the line of track to be an industrial track or spur.

In *Missouri, K. & T. R. Co. of Texas v. Texas & N. O. R. Co.* (5th Circuit, 1949), 172 F.(2d) 768, the M.,

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[2] *Missouri Pac. R. Co. v. Chicago, Rock Island & Pacific Ry. Co.* (8th Circuit, 1930), 41 F.(2d) 188;
Missouri Pac. R. Co. v. St. Louis Southwestern Ry. Co., (8th Circuit, 1934), 73 F.(2d) 21;
Union Pac. R. Co. v. Denver & Rio Grande Western R. Co. (10th Circuit, 1952), 198 F.(2d) 854;
Southern Pac. Co. v. Western Pacific California R. Co. (9th Circuit, 1932), 61 F.(2d) 732.

K. & T. (plaintiff) sought an injunction to stay Texas & N. O. R. Co. from building a track, asserting that the track was an extension of the main line. The Texas R. Co. counter-claimed that certain tracks the plaintiff was building were also extensions. The trial court held that neither line was an extension. The Texas R. Co. built into Houston first, and the M., K. & T. built its line later, crossing the Texas line about 5 miles from the center of Houston at that time, but now within the city limits. The Missouri later built a track parallel to Texas, which it used as a tail track and later served some industries from it. The City of Houston then extended a street into this new territory which would develop into an industrial area. The new territory lies in an obtuse angle formed by the crossing of the two main lines, but the Missouri had built a spur track between the industrial area and the Texas R. Co.'s main line, which is the parallel line above referred to, so that in order to reach it the Texas R. Co. would have to cross the Missouri's parallel track. This new industrial area was still "virgin prairie." The purpose of the construction of the proposed track by Texas was to reach three or four industries which were about to be established and which had sought service from the Texas R. Co. The aerial photographs show the land to be reached to be prairie land. Each railroad had purchased land in this area. Each wished a share in the anticipated traffic. The Missouri claimed exclusive rights in the territory by reason of having built the above mentioned parallel track. Neither the Commission nor any other public authority has sought to interfere. The court held:

"We do not think this case is like that of the

> *Texas & Pacific Ry. Co. v. Gulf, . . .* ; or involves an 'extension of (the) line of railroad' of either contestant. The obtuse angle of prairie land was originally bounded as much by the main line of the one as by the other. Each had a right to build spur tracks and industrial tracks from its main line into it. M. K. and T. built the first ones, and its longer one strategically paralleled the Texas and New Orleans. *But neither that nor its other spurs preempted for the M. K. and T. the hinterland, still undeveloped but in easy reach of both railroads . . . There is plenty of room and opportunity for both railroads to serve. There is no serious raiding of any established traffic.* The proposed expenditures are not unusual or very significant for these strong and extensive railroads to make. We see no need to strain to hold these tracks which are in form and in purpose and effect ordinary industrial tracks to be 'extensions of the lines of railroads' of these two great carriers, which must be authorized by the Railroad Commission." (Emphasis supplied.)

There are many similarities between the case of *Missouri, K. & T. R. Co. v. Texas* and our case. In both cases the court is dealing with virgin prairie. The land is still raw and the possibilities for business are in the future. There is a difference in distances, but there is also a difference in the type of country. One area lay in the city of Houston. Here we are dealing with a rural area devoted largely to agriculture. In the above case and here we are dealing with an area bounded by two railroads. There is no established business in the area between them served by either railroad except for an inconsiderable amount in the *Texas* case and the sugar plant in our case, but both are in a position to

serve industry in the area, should it come in. Where such a situation existed as in the case of *Missouri, K. & T. R. Co. v. Texas,* the court refused to draw a line between them or to say that one or the other had exclusive rights.

U.S. et al. v. State of Idaho, et al., 298 U.S. 105, 80 L.ed. 1070 (Brandeis, 1936). The Oregon Short Line Railroad owned 9 miles of track in Teton County, Idaho, known as the Talbot Branch, extending to coal mines at Talbot. The mines failed to operate, and the Interstate Commerce Commission, on petition of the Oregon Short Line, allowed it to abandon the branch. The State of Idaho brought this action to have the branch declared a spur so that it would have control rather than the Interstate Commerce Commission. The sole question is whether the track is a branch or a spur. The court held that the line was built for the single purpose of serving the mines. The line had never maintained a train schedule or regular service; had never furnished express, passenger or mail service; had maintained no buildings, loading platforms or an agent. The Talbot Branch was constructed and maintained for the purpose of serving a single industry; practically no other industry was served; and the trackage did not invade new territory. That its continued operation or abandonment is of local and not national concern. Therefore, the track is a spur and not an extension of the railroad.

Chicago, M., St. P. & P. R. Co. v. Chicago & E. I. R. Co. (7th Circuit, 1952), 198 F.(2d) 8. Here the Milwaukee Railroad sought to enjoin the Chicago & E. I. from building a line of track. The purpose of the

proposed track was to serve a power company. The power company had invited the Milwaukee, the Pennsylvania Railroad and the Chicago & E. I. to submit propositions for trackage. The Chicago & E. I.'s proposition was the most satisfactory and it started to build the track. In the plaintiff's complaint it alleged that the defendant's track was an extension, and raised the following issues:

> "... (a) whether the industry to be reached was in territory adjacent to, and tributary to plaintiff's line or railroad; (b) whether 'such territory' could be more practically and economically afforded carrier service by the plaintiff; (c) whether plaintiff was ready, willing and able to furnish transportation service upon proper request therefor; (d) whether such track construction by defendant would entail the expenditure of large sums of money; and (g) whether such construction would invade plaintiff's territory and deprive it of revenues which would and could normally accrue to plaintiff."

Prior to the filing of this suit, there was no railroad trackage in the area where the power company intended to build its plant. The plaintiff's railroad is less than a mile from the property line of the proposed site of the power plant and is nearest to the area. The proposed spur of the Chicago & E. I. would be 3.15 miles in length and would cross the plaintiff's railroad. The plaintiff estimated the cost of constructing the proposed trackage would be $500,000. The defendant estimated the cost of construction would be $315,000. The court held:

> "*The appellant relies heavily upon Texas & Pacific R. R. Co. v. Gulf C. & S. F. Ry. Co.,* 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578. That case was

> decided in 1926. The Santa Fe proposed to build new trackage for the purpose of reaching an industrial district which extended 2½ miles along the tracks of the Texas and Pacific. *The proposed trackage was to extend generally into territory served by the Texas and Pacific, and the effect of its construction would be to raid the established traffic of that railroad. In the case at bar the appellant, Milwaukee R. R., does not furnish service to any industry south of its present right of way.* As a matter of fact, the only industry in that territory, Viking Coal Company, is served by the C. & E. I. R. R., defendant-appellee, as we have explained. So far as this record shows, the proposed plant of Public Service Company and the Viking Mine are the only industries at present located in the area in question and there are no communities located in said area." (Emphasis supplied.)

After the consideration of several other cases, the court concludes that the proposed track is a spur and not an extension.

In the case of *Great Northern Ry. Co. Abandonment,* 247 I.C.C. 407, the Great Northern wanted to abandon 4.53 miles of track in Ferry County, Washington. There was no station on the line. The only traffic was carload to and from the mines. The billing was handled through the station at Republic. The trains operated only as traffic demanded. Two protestants contended that the line was an industrial track within the meaning of Section 1(22) of the Interstate Commerce Act and that the Commission had no jurisdiction to decree an abandonment. The Commission then held that the track served a number of mines owned and operated by several companies and reached by six spurs leading

from the main line. However, an industrial track, as that term is used in Section 1(22) of the Act, may render service for different shippers. The controlling factor in the classification of the track is the use made thereof and not the number of patrons served. The track was therefore an industrial track, and the Commission held itself to be without jurisdiction.

Specification of Error IV

IV. The court erred in finding (Finding of Fact V) that the construction of the proposed track would involve a substantial sum of money and would deprive the appellee of substantial revenue.

Mr. Derrig, the Assistant Chief Engineer of the appellant, testified that the total cost of the proposed track would be $205,505, including right of way (Exhibit A23, R. 303).

Mr. Justice Brandeis, in *Texas & Pacific v. Gulf,* in speaking of spurs or industrial tracks, stated:

> "... Moreover, the expenditure involved is ordinarily small."

The cost of the proposed track which he had under consideration was estimated at $510,000 in the year 1925.

Mr. Derrig further testified that in 1925 he could build the proposed track into Section 13 for $92,305, exclusive of right of way (R. 316). This figure was arrived at by comparing his records for that year (R. 317).

In the case of *Chicago, Milwaukee, St. Paul & Pacific R. Co. v. Chicago & E. I. R. Co.* (7th Circuit, 1952),

198 F.(2d) 8, the court held the proposed track to be a spur. The plaintiff's estimate of the cost of construction of this 3.15 miles of spur was $500,000, while the defendant's estimate was $315,000. The appellant submits that the cost of the construction of this proposed track is not unreasonable and is not beyond the reasonable limits for cost of a spur track.

The construction of this proposed track would not deprive the appellee of substantial revenue. The track is being built into raw land for the purpose of serving two industries which are not now located in the area, but intend to locate. These two industries are not being served by the Milwaukee Railroad, nor are there any other industries or producers of freight to be served by the proposed track that are now being served by the Milwaukee.

Specification of Error V

V. The court erred in finding (Finding of Fact VI) that the construction of the proposed track by the appellant is in the same territory or substantially the same as that territory sought to be served by the appellant by virtue of its application to the Interstate Commerce Commission on or about May 24, 1948, for an extension of its line of railroad into the town of Moses Lake.

On May 24, 1948, the Northern Pacific applied to the Interstate Commerce Commission for authority to construct a line of railroad from a point on its Connell Northern Branch, known as the Mitchell Spur, to Moses Lake (R. 382, see Exhibit A3). The proposed extension would extend into the town and connect with the Government-owned track leading to the Moses Lake

Airfield (R. 384). The extension would allow the Northern Pacific to participate in all the railroad business originating or terminating in the town of Moses Lake.

The Commission held that there was not a sufficient showing at that time to justify a need for two railroads in the town of Moses Lake, but there may be in a few more years, and the application was denied without prejudice to renewing it at some future date.

The Commission in its opinion did state that "no sound reason exists why application cannot be made at that time [after the land has water on it] *or without permission from us,* suitable facilities installed along the Connell Northern branch for shippers who wish to avail themselves of Northern Pacific service" (Emphasis supplied) (R. 399). The Commission also stated in the course of its opinion: "There is the possibility, however, that the applicant [Northern Pacific] might get a greater share of the traffic from the area if it established shipping facilities along the Connell Northern branch supplemental to those of the Milwaukee at Moses Lake" (R. 400).

The applicant tried to get its tracks into the town of Moses Lake and failed. But certainly, the Northern Pacific is entitled to participate in some of the business originating in the area by reason of its Connell Northern Branch running through the middle of the producing area, particularly from shippers who want Northern Pacific service.

In the instant case the Northern Pacific feels that it is only doing what the Interstate Commerce Com-

mission suggested it do, to-wit, building a track from its Connell Northern Branch to connect with a piece of land owned by the Northern Pacific in order to serve two shippers who have not been previously served by the Milwaukee and who are new to the area. This, it seems to us, is "establishing shipping facilities along the Connell Northern Branch supplemental to those of the Milwaukee at Moses Lake."

CONCLUSION

For the reasons above stated, it is respectfully submitted that the proposed track to be built by the appellant is a spur or industrial track and not an extension of its main line, and that the judgment of the trial court should be reversed.

Respectfully submitted,

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